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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THE STATE OF NEVADA,

Petitioner,

v.

CORKY DESIMONE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the mere entry of an uncontested, uncollected and unpaid default judgment entered in a drug tax proceeding constitute "punishment" for double jeopardy analysis, thus barring a subsequent criminal prosecution?

2. Does jeopardy attach upon the entry of a default judgment in a drug tax proceeding which is not predicated on any finding of guilt?

3. If tax liability, under Nevada's drug tax statute, rests on elements which are different from those necessary for criminal liability, are they the same offense?

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THE STATE OF NEVADA,
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CORKY DESIMONE,
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PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF
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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW, the State of Nevada, Petitioner herein, by and through counsel, and files this Petition for a Writ of Certiorari seeking reversal of the Opinion

of the Supreme Court of the State of Nevada.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the Nevada Supreme Court is reproduced as Appendix A. Desimone v. State, 111 Nev. ____, ____ P.2d ____ (1995), dated October 4, 1995. The order to show cause entered for the Nevada Department of Taxation is Case No. CV93-00496, entered on January 25, 1993, is reproduced as Appendix B. The judgment entered for the Nevada State Department of Taxation on May 20, 1993, in Case No. CV93-00496, is reproduced as Appendix C. The trial court's oral pronouncement in Desimone's criminal case rejecting his double jeopardy claim in Case No. CR90-0678 on October 6, 1993, is reproduced as Appendix D.

JURISDICTIONAL STATEMENT

This petition for a writ of certiorari is being filed within 90 days of the judgment of the Nevada Supreme Court, entered on October 4, 1995. Sup.Ct.R. 13. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The double jeopardy clause of the Fifth Amendment to the United States

Constitution.

2. The due process clause of the Fourteenth Amendment of the United States Constitution.

3. NRS 372A.070 is reproduced as Appendix E.

4. NRS 372A.110 is reproduced as Appendix F.

5. NRS 453.3385 is reproduced as Appendix G.

STATEMENT OF THE CASE

The facts of this case are not in dispute.

In August of 1992, Corky Desimone was arrested for possession of a trafficking quantity of methamphetamine: namely, 97.55 grams, and for other drug related felonies.

On January 28, 1993, the Nevada Department of Taxation filed a civil claim against Desimone in state trial court for unpaid taxes and penalties under Chapter 372A of the Nevada Revised Statutes. The claim was based on Desimone's alleged drug dealing and his failure to register as a drug dealer and pay the necessary taxes before doing so. Desimone never answered, and an order to show why a judgment should not enter was entered in February of 1993. Again, Desimone took no action.

In May of 1993, a default judgment was entered in the trial court against Desimone involving the tax claim. Appendix C. The judgment listed Desimone's tax liability at

$166,000. Desimone never paid the assessment.

Meanwhile, Desimone's criminal case proceeded from justice court to trial court. Mindful of the tax assessment, Desimone filed a motion to dismiss the criminal case, citing the double jeopardy clause of the Fifth Amendment, claiming the tax assessment, albeit unpaid, was a punishment. The State opposed the motion. The trial judge denied Desimone's motion in an unwritten order. The ruling is reproduced as Appendix D.

Ultimately, after a bench trial, Desimone was convicted of possession of a trafficking amount of a controlled substance. Accordingly, after Desimone was sentenced to 15 years in prison and ordered to pay a $100,000 fine, Desimone appealed to the Nevada Supreme Court in September of 1993.

After the briefs were filed in Desimone's direct appeal, this Court decided Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ____ (1994), 114 S.Ct. ____, 128 L.Ed.2d 767 (1994). Consequently, supplemental briefs were filed before the Nevada Supreme Court, and oral arguments were later heard by the court.

The Nevada Supreme Court, relying principally on Kurth Ranch, reversed the lower court order, concluding that the unpaid default judgment constituted a punishment for purposes of applying the

double jeopardy clause of the Fifth Amendment. Consequently, the subsequent criminal prosecution was barred. One Nevada Supreme Court justice dissented. No rehearing was requested.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE SUPREME COURT OF THE STATE OF NEVADA HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISIONS OF THIS COURT AND STATE COURTS OF LAST RESORT WHICH HAVE ADDRESSED THE SAME ISSUES.

In Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ____, ____ S.Ct. ____, 128 L.E.2d 767 (1994), this Court, after identifying several punitive characteristics or penalizing features in the Montana Drug Tax Act, concluded that this "concoction of anomalies" too far removed it from standard tax assessments to escape characterization as a punishment for purposes of double jeopardy analysis. Consequently, the Montana tax proceeding following an admittedly criminal prosecution was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time for the same offense.

Although Desimone's case involved a tax assessment following a default judgment, all of which preceded the criminal prosecution, and although this

Court in Kurth noted that its decision did not address that situation, see Kurth Ranch, 128 L.E.2d at 780 n.21, 794, the Nevada Supreme Court concluded that Kurth Ranch did extend to such cases.

Following Kurth Ranch, the Nevada Supreme Court found the very same punitive features in the Nevada statute, NRS 372A.070, which this Court found in the Montana scheme, and concluded that if a tax is reduced to a judgment or paid before criminal sanctions are imposed for the same offense, the state is barred from pursuing criminal sanctions. Consequently, even though Corky Desimone had never appeared or contested the tax assessment as the Kurths did in the Montana case, and even though the Nevada statutes are significantly different from the Montana scheme respecting the very points which this Court found punitive, the Nevada Supreme Court concluded that because the unpaid assessment was reduced to a default judgment, a judgment not based on any determination of guilt, findings of facts, or reception of evidence, a subsequent criminal prosecution was barred because Corky Desimone had been "punished" in the tax case, a case which by definition did not involve the same offense.

The State of Nevada respectfully submits that this Court should grant certiorari to review the Nevada Supreme Court's decision. Not only did the Nevada Supreme Court unnecessary extend Kurth

Ranch to a field in which its application may not have been intended, but the ruling itself, particularly regarding how jeopardy attaches in a case in which Desimone never appeared, and regarding whether he was punished by entry of the paper judgment, is in direct conflict with the decisions of this Court and other state courts of last resort as well on fundamental and important questions of constitutional law.

I

THERE COULD BE NO DOUBLE JEOPARDY IN THIS CASE, BECAUSE THERE WAS NO FORMER JEOPARDY.

Of the three abuses which the double jeopardy clause is designed to protect: namely, a second prosecution for the same offense following acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense in separate proceedings, only the third abuse is at issue here. Before this or any of these other abuses may be shown, there must first have been former jeopardy for the same offense. Serfass v. United States, 420 U.S. 377 (1975).

In the present case, the Nevada Supreme Court found that former jeopardy had attached in Desimone's tax proceeding for double jeopardy analysis. Consequently, the "punishment" meted out

there barred a subsequent admittedly criminal prosecution.

The State respectfully submits that the Nevada Supreme Court ruling regarding how and when jeopardy attached is an important question of the federal constitutional law since it was answered by our court in such a way that it is so much in conflict with the decisions of this Court that certiorari should be granted to review it.

The Nevada Supreme Court concluded initially that jeopardy attached here when tax was reduced to a judgment. There is absolutely no authority which supports this view, and plenty to contradict it.

For example, in Kurth Ranch there is no question about whether former jeopardy ever attached. This is evident because the Kurths appeared, defended, then contested every move the Montana authorities made whether it was in the criminal case, the forfeiture case, the bankruptcy case, or the tax case. Consequently, when the Kurth's case finished, there had been a determination on the merits, and of their guilt and innocence, a determination of guilt or innocence being the earmark of jeopardy attachment. Serfass, 420 U.S. at 388 - in a jury trial, jeopardy attaches when the jury is sworn, and in a non-jury case when the judge begins to hear evidence; see also United States v. Smith, 912 F.2d 322, 324 (9th Cir. 1990) - jeopardy attaches when the defendant enters

a plea and admits the facts constituting the offense.

This line drawing exercise serves the key constitutional function of determining when jeopardy attaches. And without a determination of guilt or innocence, there can be no jeopardy. United States v. Scott, 437 U.S. 82, 92-100 (1978). Even in Nevada, the entry of a default is not a determination on the merits. Bennett v. Fidelity & Deposit Co., 652 P.2d 1178 (Nev. 1982). This is no less important, perhaps even more so, when we must decide when jeopardy attaches in a tax proceeding.

Applying the referenced standard here, it cannot be said that Corky Desimone was ever placed in former jeopardy for purposes of double jeopardy analysis. Taylor v. Sherrill, 819 P.2d 921 (Ariz. 1991). Entry of a default is not a prosecution at which jeopardy can attach because there is no trial. Accord, United States v. Jorn, 400 U.S. 470, 479 (1971). As noted, Desimone never appeared, defended or contested the tax assessment. Rather, he let a default judgment enter. Likewise, no evidence was taken, no witnesses sworn, no plea, no admissions; only the default judgment was entered. Under no recognized standard of law can this amount to the attachment of jeopardy, because under no recognized standard can a default amount to a court sanctioned finding of guilt.

Frankly, Desimone's behavior in this case is much more of a piece with analogous

settings in forfeiture cases. The standard rule in forfeiture cases is that if a person whose property is subject to forfeiture does not appear and make a claim, this omission results in the "owner" not being placed in former jeopardy. Consequently, a subsequent criminal proceeding is not barred under the double jeopardy clause. See, for example, United States v. Torres, 28 F.3d 1463 (7th Cir. 1994), cert. denied 115 S.Ct. 669 (1994); United States v. Takamoto, 876 F.Supp. 235, 236 (D. Hawaii 1995); Crowder v. United States, 874 F.Supp. 700, 703-4 (M.D.N.C. 1994); People v. Towns, 646 N.E.2d 1336 (Ill. App. 1995).

Here, Corky Desimone, by failing to contest, appear or otherwise defend against the tax case, made a choice no less voluntary than those made in the cited forfeiture cases. Surely, the double jeopardy clause does not release or relieve criminal defendants or tax payers from the consequences of their voluntary actions and choices.

If Corky Desimone does get to avoid the consequences of his choices, he gets the best of all possible worlds. He is allowed to let the default judgment enter without any intention of paying the tax, and then move to dismiss the criminal prosecution because he has been "punished." Amazing as this may seem, it is clearly the upshot and the legal effect of the Nevada Supreme Court ruling in this case: it has

taken the old adage of having one's cake and eating it too away from the nursery rhymes and made it a rule of constitutional law.

Since the double jeopardy protection is not such a malleable tool that can be manipulated at whim, and, since the Nevada Supreme Court ruling approved this sort of deployment in a way that conflicts with the decision of this Court and other courts, the State of Nevada respectfully requests that certiorari be granted.

II

LIKE THE DRUG TAXES IN KANSAS, ALABAMA AND IOWA, THE NEVADA DRUG TAX DOES NOT IMPOSE A PUNISHMENT FOR PURPOSES OF DOUBLE JEOPARDY ANALYSIS.

In addition to concluding that Desimone was placed in former jeopardy by the Nevada tax proceeding, the Nevada Supreme Court concluded Desimone was "punished" for purposes of the double jeopardy clause by virtue of the mere entry of the default judgment. The State of Nevada respectfully submits that, while our statute may have certain deterrent effects, the statute - NRS 372A.070 - is essentially remedial and therefore civil in nature, and lacks those penalizing features which could make it a criminal statute, as was the trouble with the Montana statute and its application to the Kurths.

Since the circumstances under which a civil statute is transformed into a penal statute is an important constitutional question, particularly in the wake of Kurth Ranch, and since the Nevada Supreme Court ruling here is in direct conflict with the decisions of this Court and other courts, particularly those in Iowa, Kansas and Alabama, the State of Nevada respectfully requests that certiorari be granted.

First, in order to decide if a civil statute imposes "punishment," we must look beyond the labels found in the statute itself. Accordingly, the State cannot win the day by noting that NRS 372A.070 recites that it is civil.

On the other hand, a so-called civil penalty, like the one here, may still be remedial even if it merely reimburses the government for its actual costs arising from the defendant's criminal conduct. Such is the case here since NRS 372A.110 earmarks the funds collected though the tax mechanism for remedial purposes. Accord, United States v. Halper, 490 U.S. 435, 449-50 (1989). Additionally, the unlawfulness of an activity does not prevent its taxation. Marchetti v. United States, 390 U.S. 39, 44 (1968).

Mindful of these interests, this Court has nevertheless observed that, owing to the penalizing features of a statute, it can lose its character as a "tax" and become a mere penalty. Citing three factors, two of which this Court called

"unusual," this Court, in Kurth Ranch, concluded that Montana's drug tax had crossed the line. Kurth Ranch, 128 L.Ed.2d at 779-82. The Nevada Supreme Court, after concluding that the Montana and Nevada tax schemes were identical, employed the same multifactor analysis and concluded Desimone's tax judgment amounted to a punishment.

Already the State of Nevada has identified two puzzling features with the Nevada Supreme Court ruling. The first was extending Kurth Ranch to a case in which the tax proceeding preceded the criminal case, and secondly, the very enigmatic conclusion by the Nevada Supreme Court that a default judgment equals former jeopardy.

In the discussion to follow, the State will show that even greater anomalies exist as the Nevada Supreme Court applied the multi-factor test from Kurth Ranch to conclude that, if a tax is reduced to a (default) judgment, the State is barred from pursuing a subsequent prosecution just as we questioned how jeopardy could attach without a finding of guilt, one must wonder how the Nevada court could conclude that Desimone was punished without a finding of guilt. This analysis will not only reveal a deep conflict in the cases on these questions with the ruling here, but also draw into question whether Kurth Ranch applies in this scenario at all.

The Nevada Supreme Court, in concluding that Desimone has been punished

in the tax proceeding, held that "the critical inquiry" in determining whether jeopardy attaches to tax statutes involves the State's intention. A mere five paragraphs later, however, the majority of the Nevada Supreme Court concluded that resource to statutory intent, language and structure is not well suited to double jeopardy analysis. Obviously, this hopelessly conflates an intelligent inquiry into one of the three factors that are at issue here: namely, deterence via high taxation rates.

It would be disingenuous for the State of Nevada to suggest that our state's rate of taxation - $1,000 per gram of controlled substance - was not at least in part designed for deterrent purposes. Obviously, keeping drug dealers who fail to register and pay the tax from plying their trade surreptitiously in the state of Nevada is not in the best interests of orderly society. Nevertheless, this is a legitimate governmental goal.

On the other hand, this Court recognized in Kurth Ranch that the high rate of taxation in Montana reflected a deterrent purpose, but that alone does not automatically make a tax a punishment. 128 L.Ed.2d at 779. Thus, even if the Nevada Supreme Court had not conflated the issues of intent and statutory purpose, it would still have been wrong in concluding that intent and purpose are the critical inquiries. Accord, United States v.

Sanchez, 340 U.S. 42 (1950), a decision which is cited in Kurth Ranch, and which upheld an exorbitant tax on marijuana possession, and thereby underscored the nondispositive nature of detrimental effects revealed by high rates of taxation. See also Hill v. State, 898 P.2d 155, 160-62 (Okl. Crim. 1995).

Moreover, it should have been acknowledged by the Nevada Supreme Court that when the intent of the legislature is regulatory and the sole explanation for a statute is not punitive, the law should be deemed regulatory and civil even if it has some deterrent effect if that impact is simply an inevitable consequence of the regulatory provision. Sanchez teaches no less. See also Sonzinsky v. United States, 300 U.S. 506 (1937); Kurth Ranch, 128 L.Ed.2d at 779.

Thus, it would be fair to conclude that a statute is punitive only when its punitive impact comes from aspects of the law which are unnecessary to accomplish its regulatory and remedial purposes. Tropp v. Dulles, 356 U.S. 86, 97 (1958) - if there is no other legitimate purpose the statute could serve other than punishment, then it is penal; but, if it imposes a disability, not to punish, but to acknowledge some other legitimate goal it is not penal.

In the present case, not only did the Nevada Supreme Court conflate and then overemphasize legislative intent, it found in the Nevada statutory scheme those

"unusual features" which made the Montana scheme suspect. As will be shown below, this conclusion is not only indefensible on its face, it is also in direct conflict with other cases which have been distinguished from Kurth Ranch and in which the drug tax was upheld.

For instance, in finding that the Montana tax was a punishment, this Court factored in (1) whether the tax "hinged" on the commission of a crime and (2) whether the tax was on the possession of goods that no longer existed and that the taxpayer never lawfully possessed. The presence of these two features allowed this Court to conclude that the Montana tax so far departed from revenue laws as to become a form of punishment. The Nevada Supreme Court followed suit, but incorrectly.

Unlike the Montana punishment, the Nevada tax does not hinge on the commission of a crime, nor upon one's being arrested. While it may be true that it was unknown that Desimone had failed to pay his tax until after his arrest, the plain language of NRS 372A.070 provides that tax liability only arises when the taxpayer fails to pay the tax; mere possession, absent a sale or intent to sell, is not within the scope of Chapter 372A of the Nevada Revised Statutes. Accordingly, unlike Kurth Ranch, the commission of a crime is not a prerequisite, nor is an arrest a prerequisite to tax liability. As such, the tax should be deemed civil, and

distinguishable from that found suspect in Kurth Ranch. Accord, Sanchez, 340 U.S. at 45; Kurth Ranch, 128 L.Ed.2d at 780 n.20.

In addition, the Nevada tax, whether it be deemed a property tax or an excise tax, particularly in this case, is not on goods that no longer exist or were confiscated or destroyed as was the case in Kurth Ranch. To be sure, Desimone's drugs were seized when he was arrested, and he no longer had custody of them. Nevertheless, the taxes imposed were payable immediately as the dealer possesses the controlled substance, and before he sells, or transfers them. Thus, Nevada's tax is not on goods which Desimone did not own or possess.

Since Kurth Ranch was decided in June of 1994, at least three different cases have looked at that decision, reviewed statutes similar to that found in Nevada and very dissimilar to that found in Montana, and concluded that the tax would survive a double jeopardy challenge: namely, State v. Lange, 531 N.W.2d 708 (Iowa 1995); State v. Gulledge, 896 P.2d 378 (Kan. 1995); Milner v. State, 658 S.2d 500 (Ala.App. 1994).

In each of these decisions, the courts have been faithful to Kurth Ranch, and under virtually identical circumstances, distinguished that decision because the "unusual features" in the Montana scheme were absent from the local statute. Despite the Nevada Supreme Court's ruling

to the contrary, the "unusual features" are absent in the Nevada scheme as well, as noted above.

Since the Nevada Supreme Court ruling is out of step with Kurth Ranch, and since it is in direct conflict with at least three state court decisions on the very same important constitutional question, this Court should grant certiorari to resolve the conflict.

III

DESIMONE WAS NOT SUBJECT TO MULTIPLE PUNISHMENT FOR THE SAME OFFENSE.

In addition to deciding when jeopardy attached in Desimone's case, and concluding that Desimone was "punished" by virtue of the entry of the paper default judgment, the Nevada Supreme Court also decided another important constitutional question in a way that directly conflicts with the decisions of this Court: namely, when is an offense, particularly one having a remedial civil penalty imposed in a separate proceeding the same offense for purposes of applying double jeopardy analysis.

Here, the Nevada Supreme Court, in addressing the third of the three abuses the double jeopardy clause protects against, concluded that NRS 372A.070 and Nevada's drug trafficking statute, NRS 453.3385 are the same offense. Again,

given this Court's previous rulings on what constitutes a "same offense" the Nevada Supreme Court conclusion is demonstrably wrong.

In United States v. Dixon, 509 U.S. ____, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), a majority of this Court concluded that, for purposes of double jeopardy analysis, the relevant inquiry is whether each offense contained an element not contained in the other; if not, they are the same offense and double jeopardy bars additional punishment and successive prosecutions. 125 L.Ed.2d at 568. Accord, Blockberger v. United States, 284 U.S. 299, 304 (1932). Although the Nevada Supreme Court concluded that NRS 372A.070 and NRS 453.3365 prohibit the same offense, this conclusion, given Dixon and Blockberger, cannot be right.

By comparing and contrasting the elements of both statutes, the State of Nevada respectfully submits that the inescapable conclusion is that each statute requires proof of other and different elements. Indeed, there is no one, single denominator.

NRS 372A.070, the tax statute, provides that a person shall not sell, offer to sell, or possess with intent to sell a controlled substance unless s/he first registers as a dealer in controlled substances, pays an annual fee and pays the tax. In contrast, Desimone was convicted of possession of a trafficking quantity of

a controlled substance - shall be say - mere possession of a trafficking quantity of a controlled substance. This offense requires no proof of selling, or possession with intent to sell, registration, payment of fees or taxes. The offenses are, by definition, different.

On the other hand, it should be noted that the glossary portion of Chapter 372A, specifically NRS 372A.040, the term "sell" is defined and is a term of art. It includes ". . . transfer to another for sale or resale, possession or transportation in contravention of this chapter and any other transfer or any consideration or a promise, obtained directly or indirectly." Accordingly, mere or simple possession of a controlled substance does not fit this definition in any way. To conclude otherwise would render statutes like those found in NRS 372A.070 nonsensical.

CONCLUSION

For the reasons stated above, petitioner asks that a writ of certiorari to the Nevada Supreme Court issue and that the decision of the Nevada Supreme Court be reversed.

Respectfully submitted.

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APPENDIX A

IN THE SUPREME COURT

OF THE STATE OF NEVADA

CORKY DESIMONE, No. 24971

Appellant, Filed:
October 4, 1995

vs.

THE STATE OF NEVADA,

Respondent.
_____/

Appeal from a judgment of conviction of one count of possession of a trafficking quantity of a controlled substance. Second Judicial District Court, Washoe County; Mills B. Lane, Judge.

Reversed.

Michael R. Specchio, Public Defender, and John Reese Petty, Deputy Public Defender, Washoe County, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Gary H. Hatlestad, Deputy District Attorney, Washoe County, for Respondent.

O P I N I O N

By the Court, YOUNG, J.:

Appellant Corky Desimone ("Desimone") was arrested for possession and sale of methamphetamine. Desimone was assessed a tax and penalties in the amount of $166,000 pursuant to NRS chapter 372A for illegal possession of a controlled substance. The State reduced this amount to judgment. Desimone was then convicted in a bench trial of one count of possession of a trafficking quantity of a controlled substance. Desimone appeals his conviction, presenting two arguments: (1) the district court erred in convicting him, because the criminal conviction is a second punishment barred by the Double Jeopardy Clause; and (2) in the alternative, the case must be remanded for a hearing to determine whether the taxes and penalties imposed by the State pursuant to NRS chapter 372A constitute punishment sufficient to implicate the Double Jeopardy Clause. The reasons discussed herein, we reverse Desimone's conviction, but conclude that remand is unnecessary.

FACTS

On August 1, 1992, shortly after Desimone was released from prison in California, undercover officers arrested Desimone after he provided three ounces of methamphetamine in exchange for what Desimone believed to be stolen property. Desimone was charged with five violations of NRS chapter 458, all involving the possession and sale of methamphetamine. On January 28, 1993, the Nevada Department of Taxation ("the Department") filed a claim against Desimone in the amount of $166,000 in unpaid taxes and civil penalties pursuant to NRS chapter 372A, entitled "Tax on Controlled Substances." This statute forbids a person to "sell, offer to sell or possess the intent to sell a controlled

substances" unless he registers with the Department and pays a tax on that controlled substance. NRS 372A.970. The term "sell" is defined broadly to include "exchange, barter, solicitation or receipt of an order, transfer to another for sale or resale, possession or transportation in contravention of this chapter and any other transfer for any consideration or a promise, obtained directly or indirectly." NRS 272A.040. The tax does not apply "to any person who is registered or exempt from registration pursuant to NRS 453.226 or any other person who is lawfully in possession of a controlled substance." NRS 372A.060. Those exempt from the provisions of the statute include the ultimate user in possession of a controlled substance pursuant to a lawful order of a physician, in addition to manufacturers, distributors, and dispensers of those controlled substances. NRS 453.226. On May 20, 1993, the district court entered judgment against Desimone in favor of the Department for the entire amount of $166,000.

On September 22, 1993, Desimone was convicted of one count of possession of a trafficking quantity of a controlled substance. He was sentenced to fifteen years imprisonment and fined $100,000. Desimone appealed, claiming that the criminal conviction constituted a second punishment in violation of the Double Jeopardy Clause of the United States and Nevada Constitutions.

DISCUSSION

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb."

U.S. Const. amend V.[1] This protection is afforded the citizens of Nevada through the Fourteenth Amendment and the Nevada Constitution itself. See Nev. Const. art. I, section 8. The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. United States v. Halper, 490 U.S. 435, 440 (1989). The third abuse is at issue in this case, an abuse which "can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state."

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[1]The meaning of "life or limb" reflects an incorporation of broad common law protections. "Although the constitutional language, 'jeopardy of life o limb,' suggests proceedings in which only the most serious penalties can be imposed, the Clause has long been construed to mean something far broader than its literal language." Breed v. Jones, 421 U.S. 519, 529 (1975). In Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874), for instance, the Court noted that double jeopardy protections for both civil and criminal offenses had long found expression in the common law. Lange, 85 U.S. at 168. "In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause." Id. The Court concluded that it was unnecessary "to insist that other cases besides those involving life or limb are positively covered by the language of this amendment." Id. at 170 (emphasis in original).

Id. at 447.[2] Considering this admonition,

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[2]We note some confusion with respect to the "multiple punishments" component of the Double Jeopardy Clause. Justice Scalia, who once believed that a multiple-punishment component of the Double Jeopardy Clause existed, see United States v. Dixon, ____ U.S. ____, ____, 113 S.Ct. 2849, 2855 (1993), abandoned his position in Dep't of Revenue of Montana v. Kurth Ranch, ____ U.S. ____, ____, 114 S.Ct. 1937, 1955 (1994), concluding in dissent that "'[t]o be put in jeopardy' does not remotely mean 'to be punished,' so by its terms this provision [the Double Jeopardy Clause] prohibits, not multiple punishments, but only multiple prosecutions." Joined by Justice Thomas, Scalia distinguished Lange, stating that the opinion "went out of its way not to rely exclusively on the Double Jeopardy Clause, in order to avoid deciding whether it applied to prosecutions not literally involving 'life or limb.'" Kurth Ranch, ____ U.S. at ____, 114 S.Ct. at 1956. Driving Scalia's change of heart is an apparent conviction that application of double jeopardy analysis to civil proceedings authorized by the legislature, a phenomenon Scalia claimed arose out of Halper, would lead to intolerable results. Id. at ____, 114 S.Ct. at 1958-59. He concluded that it was "time to put the Halper genie back in the bottle." Id. at ____, 114 S.Ct. at 1959. Scalia distinguished subsequent cases purporting to follow Lange with respect to the multiple punishments doctrine by noting that "the repetition of a dictum does not turn it into a holding." Id. at ____, 114 S.Ct. at 1956. We admit to having similar concerns about the multiple punishments component of the Double Jeopardy Clause.

we must determine whether taxes and penalties imposed on, but not paid by, Desimone under NRS chapter 372A for possession of methamphetamine constitute "punishment."

Whether a tax levied pursuant to NRS 372A constitutes a penalty for purposes of double jeopardy analysis

A civil penalty is considered "punishment" for double jeopardy purposes when that penalty does not solely "serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes." Halper, 450 U.S. at 448; accord Austin v. United States, ____ U.S. ____, ____, 113 S.Ct. 2801, 2806 (1993) (holding that forfeiture is a punishment if it does not serve solely remedial purposes). It is these "purposes actually served by the sanction in question . . . that must be evaluated." Halper, 450 U.S. at 447, n.7 (emphasis added).

Whether a tax constitutes a punishment, triggering protections of the Double Jeopardy Clause, was recently answered by the United States Supreme Court in Dep't of Revenue of Montana v. Kurth Ranch, ____ U.S. ____, 114 S.Ct. 1937 (1994). There, the Court concluded that a tax on the possession of illegal drugs assessed after the State of Montana imposed a criminal penalty for the same offense constituted double jeopardy. Id. at ____, 114 S.Ct. at 1948. In Kurth Ranch, a family of Montana farmers supplemented its

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And while we agree that repetition of dicta does not necessarily give rise to a holding, we are constrained to conclude the same of dissenting opinions.

income by cultivating a significant marijuana crop. Id. at ____, 114 S.Ct. at 1942. Montana law enforcement officers raided the farm, prosecuted family members, and then attempted to collect a state tax imposed for possession and storage of dangerous drugs. Id. at ____, 114 S.Ct. at 1941-43. The tax totalled $181,000, a figure arrived at by placing a $100-an-ounce tax on 1,811 ounces of marijuana harvested by the farmers. Id. The farmers declared bankruptcy, and the state's claim for the tax was denied by the bankruptcy court on double jeopardy grounds. Id. The bankruptcy court's decision was affirmed by the district court, the United States Court of Appeals for the Ninth Circuit, and finally by the United States Supreme Court. Id. at ____, 114 S.Ct. at 1943-44.

The Court concluded that a tax is not immune from double jeopardy scrutiny, id. at ____, 114 S.Ct. at 1946, even though in most cases a state may legitimately tax criminal activity. See Marchetti v. United States, 390 U.S. 39, 44 (1968). Rather than focus on whether a state purpose was accomplished by enforcement (i.e., actual payment of a fine), the Court in Kurth Ranch considered the underlying motivation of the state tax statute to determine the "purposes actually served" by the State's enforcement action. The Court considered the following factors in concluding that the Montana tax was primarily designed to punish rather than to raise revenue: (1) the high rate of taxation--eight times the street value of the confiscated marijuana; (2) the deterrent purpose, based on the use of tax revenues for anti-crime initiatives; (3) the requirement that the tax be imposed solely upon criminal activity, such as illegal marijuana growing; and (4) the imposition of the tax upon good which were neither owned nor possessed by the debtor.

Kurth Ranch, ____ U.S. at ____, 114 S.Ct. at 1946-48. The Court concluded that these factors, taken as a whole, indicated that the drug tax was "too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." Id at ____, 114 S.Ct. at 1948.

As Kurth Ranch makes clear, the crucial inquiry in determining whether jeopardy attaches to tax statutes probes the state's intentions. Kurth Ranch identified characteristics of the state's enactment and prosecution of the tax statute to test objectively if the state intended punishment. Whether actual punishment occurred in each individual case was not part of the inquiry. A requirement of actual punishment would require a factual review after every prosecution to reveal what, if any, payment a defendant has made toward the fine. Further, a determination must be made of how great partial payment must be for jeopardy to attach. This approach could only lead to a greater number of appeals and the absurd result of defendants frustrating future criminal prosecution by paying a minimum amount pursuant to tax statute liability. Kurth Ranch wisely refrained from adding actual punishment to the jeopardy formula, and we consider that guidance sound.

NRS chapter 372A exhibits the same punitive aspects as the Montana illegal drug tax. First, the Nevada law imposes a $1,000 per-gram fee for methamphetamine (and a $100 per-gram fee for marijuana). See NRS 372A.070. This amount far exceeds the high rate of taxation condemned in Kurth Ranch. See NRS 372A.070.

Second, potential tax proceeds are earmarked to pay for anti-crime

measures, as were the proceeds of the tax analyzed in Kurth Ranch. See NRS 372A.110.

Third, the tax is designed to punish criminal activity. As Desimone points out, pharmaceutical companies, pharmacists, and medical practitioners are exempt from the tax. See NRS 453.226. Thus, although criminal activity is not strictly required before the tax is imposed, the non-criminal possession and sale of controlled substances by legitimate manufacturers, distributors, and ultimate users fall outside the scope of the tax. See NRS 372A.060(1). In fact, legislators contemplating initial passage of NRS chapter 372A "seriously doubted" whether any drug dealer would actually register under the statute. Minutes of the Senate Taxation Committee, 64th Sess. 3 (March 12, 1987). The sponsor of the legislation agreed, adding that the "intent was to use the proposed law as a way to gain an advantage over drug dealers." Id. The retroactive use of the tax to punish, rather than to seek registration of controlled substances, is the manifest intent of NRS chapter 372A.

Fourth, the methamphetamine confiscated by the State, like the marijuana confiscated in Kurth Ranch, was not in the possession or ownership of the defendant when the tax was imposed.

We conclude, therefore, that the payment of a tax pursuant to NRS chapter 372A constitutes punishment, triggering the protections of the Double Jeopardy Clause.[3]

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[3]The dissent claims that the "purposes actually served" by the State's judgment against Desimone were negligible. Apparently, the dissent measures whether the State's purposes are actually served by an accounting of collections on judgments.

The Kurth Ranch factors reveal that NRS chapter 372A is far-removed in crucial respects from a standard tax statute.

In contrast, the State asserts that the statute is remedial in nature. The state offers absolutely no authority to explain why the statute is solely remedial, although it concludes that the legislative history supports this assertion. In fact, the sponsor of the bill giving rise to NRS chapter 372A introduced the legislation as serving two purposes: first, to "get the drug dealers where it really hurts - in the pocketbook," and second, to provide "a whole new avenue of deterrents and punishment for drug dealers outside of the fines, sentences and courtroom procedures under current law." Minutes of the Senate Taxation Committee, 64th Sess. 1-8, Exhibit C (March 12, 1987) (Senator John M. Vergiels, Introductory Remarks for Senate Bill 144) (emphasis added).

The State's assertion runs directly afoul of the teachings of Halper, which concluded that recourse to statutory language, structure, and intent "is not well suited to the context of 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments."[4] Halper, 490 U.S. at 447;

As stated above, the State had many other intentions and purposes that were actually served when it proceeded against Desimone under NRS 372A.

[4]While the dissent recognizes no difference between the labels attached to a statute during legislative debate and the label of "judgment" attached after a judicial proceeding, the difference is clearly apparent. The "judgment" label

accord Kurth Ranch, ____ U.S. at ____, 114 S.Ct. at 1945 (summarizing Halper as deciding that the legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character).

Our conclusion does not render NRS chapter 372A unconstitutional on its face. Whether a tax imposed under the statute is unconstitutional in and of itself potentially presents issues under the Excessive Fines Clause, the Cruel and Unusual Punishment Clause, or the Due Process Clause.[5] See Kurth Ranch, ____ U.S. at ____, 114 S.Ct. at 1958-59 (Scalia, J., dissenting); Austin, ____ U.S. at ____, 113 S.Ct. at 2805 (applying Excessive Fines Clause analysis to forfeiture statute).

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applies a stigma directly upon an individual member of our citizenry. The Double Jeopardy Clause was drafted specifically to scrutinize the application of this label, not the labels coined through legislative debate.

[5]The mere fact that jeopardy is found to attach to a civil penalty does not automatically make that penalty void as a violation of the Due Process Clause. The United States Supreme Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation. Marchetti, 390 U.S. at 44. In this case, Desimone presented no evidence or argument that his due process rights were violated by the tax statute. Our review of the record reveals no such violation. In fact, Desimone was notified of the determination of his liability under the tax statute but failed to pursue any remedies. Accordingly, we presume the judgment was valid.

Our conclusion simply requires taxes assessed under the statute to be considered punishment for double jeopardy purposes. As both Kurth Ranch and Halper instruct, a civil penalty may be levied in full, even if it does constitute punishment, as long as the debtor is not subject to further prosecution for the same offense. Kurth Ranch, ____ U.S. at ____, 114 S.Ct. at 1945; Halper, 490 U.S. at 450-51. Furthermore, the State can avoid the double jeopardy issue by enhancing fines imposed in the same proceeding in which the State seeks criminal sanctions. These fines present no double jeopardy issue and are rendered in a proceeding that affords the defendant the benefit of greater due process protections and a higher burden of proof.

We feel some apprehension in applying our conclusion in this case, however, because the State imposed civil sanctions upon Desimone before obtaining a criminal conviction. Thus, application of double jeopardy analysis would render the criminal conviction invalid, rather than merely the civil fine.[6] In an effort to avoid this consequence, the State argues that Desimone's criminal conviction need not be overturned because Desimone has not actually paid any of the fine assessed against him. Absent actual payment, the State contends that Desimone has essentially not been punished. The State relies solely upon United States v. Sanchez-Escareno, 950 F.2d 193 (5th Cir.

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[6]This result, according to the dissent, would create a windfall for the defendant. If bare enforcement of constitutional guarantees creates a windfall for our state's citizenry, then we shall all benefit.

1991), cert. denied, ____ U.S. ____, 113 S.Ct. 123 (1992), to support this contention. There, the Fifth Circuit reversed the district court's dismissal on double jeopardy grounds of criminal charges involving drug importation. Id. at 195. The district court believed that the civil fines assessed before criminal charges were imposed constituted punishment sufficient to trigger application of the Double Jeopardy Clause. Id. at 194-95. On appeal, the court noted tat if paid, the civil fines would constitute punishment because they were punitive in character. Id. at 195. Rather than affirming dismissal of criminal charges, however, the court concluded that no punishment had occurred, in the absence of a judgment or actual payment of the fines.[7] Id. at 201.

In Ward v. State, 870 S.W.2d 659 (Tex. Ct. App. 1994), a Texas court of appeals came to a similar conclusion on facts resembling those in Desimone's case. However, because "[t]he State ha[d] not sought a judgment . . . and there [] [was]

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[7]In Sanchez-Escareno, the defendants had signed promissory notes as obligations to pay civil penalties. The Court distinguished between promissory notes and judgments by stating that the former did not involve subjecting the defendant to trial. Id. at 202. Further, by stating that the lack of a judgment prevented jeopardy from attaching to the execution of promissory notes alone, the Court clearly distinguished between judgments and promissory notes. The Court's reasoning can be explained by the stigma that is hung upon a defendant by judgment, nota promissory note. It is this stigma that is ignored by the dissent, but recognized by the Double Jeopardy Clause.

no adjudication by a court," the tax was not punishment. Id. at 662. Because the State's pursuit of a court sanctioned finding of guilt is clear evidence of the State's intent to punish, a judgment is essential to the jeopardy analysis.[8]

Desimone argues, however, that civil penalties levied against him have already been reduced to judgment, rendering Sanchez-Escareno inapplicable. He emphasizes the following language of Sanchez-Escareno:

> We find that appellees' execution of promissory notes, in the absence of a judgment or payment by appellees, does not constitute "punishment" under the Double Jeopardy Clause, neither in the ordinary nomenclature associated with the word, nor pursuant to an analysis of various cases which have addressed the multiple punishment issue.

Sanchez-Escareno, 950 F.2d at 201 (emphasis added).

Desimone's argument is persuasive. In both Ward and Sanchez-

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[8]The dissent characterizes Ward as a case supporting the concept that payment is necessary for jeopardy to attach to a tax statute fine. First of all, the Ward court found that jeopardy did not attach even though the defendant did make a partial payment of the fine. Id at 662. Second, the dissent's insistence on payment for a finding of punishment is misplaced. The essential tenet of the Double Jeopardy Clause is to protect our citizenry from being subject to multiple punishments, not being actually punished. See Kurth Ranch, supra at 1955. (Scalia, J., dissenting).

Escareno, penalties had merely been assessed, rather than reduced to judgment. Sanchez-Escareno, 950 F.2d at 195; Ward suggest that the Double Jeopardy Clause would prevent a criminal conviction following a civil penalty reduced to judgment. Indeed, it is the purposes actually served by the State's enforcement of a tax statute that trigger double jeopardy protection. These purposes, including the use of a judgment to deter future crime, are served though a judgment alone.

We must conclude, therefore, that double jeopardy analysis is triggered whether or not the civil penalties preceded criminal prosecution.[9]

Whether this matter must be remanded for further proceedings

Relying on Halper, both Desimone and the State indicate that this court may remand the case to determine whether the civil fines assessed against Desimone

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[9]The implications of this inevitable conclusion concerned Justice Scalia in his Kurth Ranch dissent, who noted that disallowing a civil sanction because punishment has already been imposed was a "relatively easy task," while disallowing criminal punishment because a civil sanction has already been imposed would be much more demanding. Kurth Ranch, ____ U.S. at ____, 114 S.Ct. at 1958 (Thomas, J., joining in dissent). The majority of courts that have analyzed this more demanding situation properly reasoned that the sequence of punishment is irrelevant. See e.g., Sanchez-Escareno, 950 F.2d at 200 (noting that "the order of proceedings matters not to the analysis").

constitute punishment. As Halper makes clear, the Double Jeopardy Clause is implicated by any civil penalty "to the extent" that it exceeds a rough accounting of the costs incurred by the government. Halper, 490 U.S. at 449. It follows that whatever does not exceed this rough approximation is not prohibited. Accordingly, the Court in Halper remanded the case, giving the "trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment." Id. at 450.

Halper, however, involved civil penalties exclusively, not a tax. Kurth Ranch notes that Halper did not decide whether a tax could be characterized as punishment. Kurth Ranch, ____ U.S. at ____, 114 S.Ct. at 1944-45. The Court reasoned that "fines, penalties, and forfeitures are readily characterized as sanctions, [but] taxes are typically different because they are usually motivated by revenue-raising rather than punitive purposes." Id at ____, 114 S.Ct. at 1946. For this reason, Halper's method of determining whether a government penalty was remedial or punitive "'simply does not work in the case of a tax statute.'" Kurth Ranch, _____ U.S. at ____, 114 S.Ct. at 1948 (quoting Chief Justice Rehnquist's dissent). The Court in Kurth Ranch therefore concluded that remand was inappropriate, because "the formula by which Montana computed the tax assessment would have been the same regardless of the amount of the State's damages and, indeed, regardless of whether it suffered any harm at all." Id.

Neither the State nor Desimone had the benefit of the analysis in Kurth Ranch, which was decided long after briefs

in this case were filed. We conclude that further findings of fact in Desimone's case are not needed, based on Kurth Ranch. NRS chapter 372A is not designed to reimburse the government, so a determination of the expenses incurred by the government is unnecessary. Similar to the tax analyzed in Kurth Ranch, the tax assessed under NRS chapter 372A would be the same regardless of the expenses incurred by the government.

CONCLUSION

We hold that a tax under NRS chapter 372A constitutes punishment under the Double Jeopardy Clause. If this tax is reduced to judgment or paid before criminal sanctions are imposed for the same offense, then the State is barred from pursuing criminal sanctions. Similarly, if the State first imposes criminal sanctions, the State is barred from then imposing a tax under NRS chapter 372A. No question of fact involving this holding exists to justify a remand. For these reasons, we reverse Desimone's criminal conviction.

s/Young, J.
Young

We agree:

s/Springer, J.
Springer

s/Shearing, J.
Shearing

s/Rose, J.
Rose

STEFFEN, C.J., dissenting:

Respectfully, I dissent. As I will explain, Desimone has suffered no punishment as a result of the civil judgment entered against him, and there is no basis for reversing his criminal conviction on grounds of double jeopardy.

I fully agree with the majority that "[t]he retroactive use of the tax to punish, rather than to seek registration of controlled substances, is the manifest intent of NRS chapter 372A." However, under the circumstances of this case, I do not agree with the majority's conclusion that the "payment of a tax pursuant to NRS chapter 372A constitutes punishment." Aside from the fact that Desimone has not paid the judgment or any part thereof, any payment made by a defendant under the referenced statute would require a refund, as the judgment would be void ab initio whether payment is made or not.

Having agreed that the "civil tax" imposed under chapter 372A is clearly a criminal penalty, it is necessary to evaluate the statute in order to determine its validity for any purpose. NRS 372A.140 provides:

> 1. The tax and civil penalties assessed by the department are presumed to be valid and correctly determined and assessed. The burden is on the taxpayer to show their incorrectness or invalidity.
>
> 2. Any certificate of delinquency or other statement of the amount of tax and penalties determined or assessed by the department is admissible in evidence and is prima facie evidence of the facts it contains.

(Emphasis added.)

It is fundamental beyond the need for citation that any criminal conviction or penalty must be proven by the State under the criminal burden of proof beyond a reasonable doubt. Under chapter 372A the State bears no burden of proof at all, and the defendant "taxpayer," who is in reality a criminal defendant is required to shoulder the entire burden. See Tehan v. United States ex rel. Shott, 382 U.S. 406, 415 (1966) ("even the guilty are not to be convicted unless the prosecution [can] 'shoulder the entire load'"). Moreover, the defendant under chapter 372A is also faced with a presumption that the "tax" and "civil penalties" are "correctly determined and assessed." We thus have a criminal statute that creates a presumption of guilt concerning the defendant's liability for payment of the penalty and the amount thereof, and places the burden of proof on the defendant that the assessment of the penalty is unwarranted. To place such criminal liability on defendants under the guise of a tax is simply an unconstitutional denial of due process that renders all such "civil judgments" void.

Desimone's "civil judgment" was entered pursuant to "[t]he Department's determination of tax liability [that] was conducted in compliance with the provisions of Chapter 372A of NRS and the regulations promulgated thereunder." The quoted material from the "certificate of Tax Delinquency (NRS 372A.140)" was followed by the declaration that "[t]he defendant assessee has been given proper notice of the Department's determination of liability, and has either exhausted or failed to timely pursue its [sic] administrative remedies." In short, the "judgment" was entered without a hearing, and by the equivalent of a default in the

pursuit of administrative remedies by the defendant.

Since the criminal judgment masquerading in civil attire was void from the beginning, and because it has resulted in no punishment to Desimone, the civil judgment may not be used as a basis for a claim of double jeopardy with respect to Desimone's conviction, after a bench trial, on one count of possession of a trafficking quantity of a controlled substance. I would simply vacate the civil judgment as void, and affirm Desimone's criminal conviction on the possession count.

In addition to the above reasoning, I suggest that a mere paper judgment, unpaid, constitutes no punishment to Desimone. The majority relies on United States v. Sanchez-Escareno, 950 F.2d 193 (5th Cir. 1991), cert. denied, 113 S.Ct. 123 (1992), for the proposition that the entry of a judgment that amounts to a criminal penalty is sufficient for purposes of the double jeopardy prohibition. I do not agree.

In Sanchez-Escareno the defendants were arrested for the illegal importation of marijuana and, thereafter, civil penalties were imposed upon each defendant. The civil penalties preceded the criminal prosecutions, and since the defendants did not or could not pay the civil fines, each defendant signed a promissory note agreeing to pay the stipulated fine. Id. at 195-197. Thereafter, the defendants challenged the criminal proceedings on double jeopardy grounds stemming from the civil penalties. As noted by the majority in the instant case, the Sanchez-Escareno court rejected the argument, stating that the execution of the promissory notes, "in the absence of a judgment or payment by appellees, does not constitute 'punishment' under the Double

Jeopardy Clause." Id. at 201 (emphasis added).

Despite the reference to a judgment by the Sanchez-Escareno court, the rationale of the holding undermines the reference to a judgment. For example, the court states that the purpose of the promissory notes was only to obtain prima facie evidence that the defendants owed the money, and the "[t]he notes did not constitute any actual payment or actual satisfaction whatsoever. Id. at 202 (emphasis added). Obviously, a "judgment" is also a mere paper entry that does not constitute actual payment or satisfaction of the judgment to any degree. Moreover, as previously emphasized, the court's rationale is clearly attached to the actual payment or satisfaction of the penalty. In addition, the Sanchez-Escareno court noted that the promissory notes anticipated "the need for future legal action." Id. Manifestly, in most of these types of cases, a judgment would be as likely to require future legal action to effectuate recovery as would promissory notes.

Finally, declaring that "'a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goal of punishment,'" id. (quoting United States v. Halper, 490 U.S. 435, 448 (1989)) (emphasis added), the Sanchez-Escareno court questions how the "government's attempt to confirm evidence of debt in a circumstance where the government contemplates the possibility of further court action . . . serves the goal of punishment[.]" Id.

Given the reasoning noted above, it is difficult to understand how the unsatisfied paper judgment entered against Desimone can possibly constitute punishment where there is not the slightest indication through the execution of a promissory note

or otherwise that Desimone ever intends to satisfy the judgment. Equally clear is the fact that any attempt by the State to collect the judgment would undoubtedly involve further litigation. Certainly the default judgment entered by the district court has no prospect of serving "the goal of punishment" with respect to Desimone. Indeed, as matters now stand, the judgment has accomplished only Desimone's release from criminal liability at society's expense.

The case of Ward v. State, 870 S.W.2d 659 (Tex. Ct. App. 1994), also relied upon by the majority is equally deficient for the proposition cited. Ward, relying on Sanchez-Escareno, concluded that the tax was not a punishment for two reasons. First, "[t]he State has not sought a judgment . . . and there has been no adjudication by a court." Id. at 662. Second, the court stated that "in the absence of payment by appellant, the assessment does not constitute 'punishment.'" Id. The latter reason stated by the court clearly undermines the former. A judgment, standing alone, does not constitute, to any degree "payment." Moreover, in Ward the defendant actually made an availing payment of $250 towards satisfaction of a judgment entered in the amount of $109,546.50. Arguably, the small payment could be viewed as some indication on the part of the defendant that he intended to pay the judgment, a factor not present to any degree in the instant case.

Finally, in citing to Halper, the Ward court completely overlooked the statement in Halper that "in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction,

that must be evaluated." Halper, 490 U.S. at 447 n.7. In the instant case, the purposes actually served by the paper judgment against Desimone were negligible. Given the fact that both Dep't of Revenue of Montana v. Kurth Ranch, _____ U.S. _____, 114 S.Ct. 1937 (1994) and Halper strand for the proposition that labels attached to statutes, taxes, civil penalties, and fines are not controlling, it seems apparent to me that the mere act of securing a judgment (i.e., transmuting the assessed "tax" into a "judgment") does not alter or change the fact that the defendant has suffered no punishment. Indeed, under the majority's ruling, Desimone has succeeded in punishing the government and the society it is formed to protect, while reaping a windfall for himself. I do not subscribe to the view that the double jeopardy clause embraced any such purpose.

For the reasons abbreviated above, I respectfully dissent.

s/Steffen, C.J.
Steffen

APPENDIX B

No. CV93-00496
Dept. 1

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

NEVADA DEPARTMENT OF TAXATION,
Plaintiff,

v. ORDER TO SHOW CAUSE
NRS 360.430

CORKY DESIMONE,
Defendant.
_____/

A certificate of tax delinquency under NRS 372A.140 has been filed with this court by the Nevada Department of Taxation seeking a judgment for unpaid taxes, penalties and interest in the amount of $166,000.00. Therefore, pursuant to NRS 360.430:

IT IS ORDERED that the Defendant Assessee CORKY DESIMONE appear before this Court on the 20th day of May, 1993, at 1:30 o'clock p.m. at 75 Court Street, Reno, NV, to show cause why a judgment for unpaid taxes, penalties and interest should not be entered against him.

IT IS FURTHER ORDERED that this Order to Show Cause shall be served on the defendant Assessee at least ten (10) days prior to the hearing.

DATED this 25th day of February, 1993.

s/JERRY CARR WHITEHEAD
DISTRICT JUDGE

APPENDIX C

No. CV93-00496
Dept. 1

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR
THE COUNTY OF WASHOE

NEVADA DEPARTMENT OF TAXATION,
Plaintiff,

v. JUDGMENT

CORKY DESIMONE,
Defendant.
_____/

No sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court renders judgment as follows:

That CORKY DESIMONE pay the State of Nevada, Department of Taxation, unpaid taxes, penalties and interest in the amount of $166,000.00 pursuant to NRS 372A.140.

DATED this 20th day of May, 1993.

s/JACK B. AMES
DISTRICT JUDGE

APPENDIX D

THE COURT: Okay. Well, all right. I have read all the Points and Authorities. I am familiar with it. My view is this, Mr. Calvert: You are certainly welcome to make a record. Mr. Desimone was released from prison in California. Shortly thereafter, he was involved in another offense with a co-defendant which involved the possession and the sale of stolen property. In my view, he is a threat to the community. And I am prepared to deny bond pending appeal on that basis. But I also, and if the Supreme Court reviews this, I hope the Supreme Court does, I would also point out in my view, and I know it is narrowly construed, in my view, this appeal is frivolous. It is frivolous to say that jeopardy forecloses a prosecution because of the civil forfeiture implication. I don't think that is the law. If it is reviewed, in my view, it is frivolous. I am not denying bond on that reason. I am denying it because I think this defendant, having shortly being released from prison, involved in another public offense shortly thereafter, is a threat to the community. Bond will be denied pending appeal. Mr. Calvert, if you want to make a record.

372A.070 Registration with department as dealer; payment and calculation of tax; identifying information in tax return; civil penalty; action for enforcement.

1. A person shall not sell, offer to sell or possess with the intent to sell a controlled substance unless he first:

(a) Registers with the department as a dealer in controlled substances and pays an annual fee of $250; and

(b) Pays a tax on:

(1) Each gram of marihuana, or portion thereof, of $100;

(2) Each gram of any other controlled substance, or portion thereof, of $1,000; and

(3) Each 50 dosage units of a controlled substance that is not sold by weight, or portion thereof, of $2,000.

2. For the purpose of calculating the tax imposed by subparagraphs (1) and (2) of paragraph (b) of subsection 1, the controlled substance must be measured by the weight of the substance in the dealer's possession, including the weight of any material, compound, mixture or preparation that is added to the controlled substance.

3. The department shall not require a registered dealer to give his name, address, social security number or other identifying information on any return submitted with the tax.

4. Any person who violates subsection 1 is subject to a civil penalty of 100 percent of the tax in addition to the tax imposed by subsection 1. Any civil penalty imposed pursuant to this subsection must be collected as part of the tax.

5. The district attorney of any county in which a dealer resides may institute and conduct the prosecution of any action for violation of subsection 1.

6. Property forfeited or subject to forfeiture pursuant to NRS 453.301 must not be used to satisfy a fee, tax or penalty imposed by this section.

(Added to NRS by 1987, 1738; A 1989, 814)

APPENDIX F

372A.040 "Sell" defined. "Sell" includes exchange, barter, solicitation or receipt of an order, transfer to another for sale or resale, possession or transportation in contravention of this chapter and any other transfer for any consideration or a promise, obtained directly or indirectly.

(Added to NRS by 1987, 1737)

APPENDIX G

353.3385 Trafficking in controlled substances: Schedule I substances except marihuana. Except as authorized by the provisions of NRS 453.011 to 453.552, inclusive, any person who knowingly or intentionally sells, manufactures, delivers or brings into this state or who is knowingly or intentionally in actual or constructive possession of any controlled substance which is listed in schedule I, except marihuana, or any mixture which contains any such controlled substance shall be punished, if the quantity involved:

1. Is 4 grams or more, but less than 14 grams, by imprisonment in the state prison for not less than 3 years nor more than 20 years and by a fine of not less than $50,000.

2. Is 14 grams or more, but less than 28 grams, by imprisonment in the state prison for life or for a definite term of not less than 10 years and by a fine of not less than $100,000.

3. Is 28 grams or more, by imprisonment in the state prison for life or for a definite term of not less than 25 years and a fine of not less than $500,000.

(Added to NRS by 1983, 287)

Supreme Court, U.S.
FILED
APR 8 1996
CLERK

ORIGINAL

(2)

No. 95-1058

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE STATE OF NEVADA, Petitioner

v.

CORKY DESIMONE, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON BEHALF OF RESPONDENT, CORKY DESIMONE

Respondent, CORKY DESIMONE, by and through his counsel, hereby applies, pursuant to Rule 39 of the Rules of The United States Supreme Court, for leave to proceed in forma pauperis in his opposition to the petition for writ of certiorari in the above-entitled case. The reason for this request is set forth in the attached affidavit.

DATED this 2 day of April, 1996.

MICHAEL R. SPECCHIO
Washoe County Public
Defender

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SUPREME COURT, U.S.

Respondent is still indigent and would qualify for representation by the Washoe County Public Defender;

6. That the Washoe County Public Defender is an institutional defender of indigent defendants and is subject to tight budgetary constraints and thus seeks leave under Rule 39 so that it may file its Brief in Opposition in conformity with Rule 33(2)(b);

7. That this motion is made in good faith and not for purposes of delay.

MICHAEL R. SPECCHIO
WASHOE COUNTY PUBLIC
DEFENDER

Subscribed and Sworn to before me this 8 day of April, 1996.

NOTARY PUBLIC

AMY A. PETERSON
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 96-0224-2 - EXPIRES DEC. 8, 1999

WASHOE COUNTY

"To Protect and To Serve"

OFFICE OF THE PUBLIC DEFENDER
MICHAEL R. SPECCHIO, PUBLIC DEFENDER

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April 10, 1996

William K. Suter
Clerk of the Court
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-0001

ATTENTION: Kathy Tycz

VIA FAX: (202) 479-3021

Re: Nevada v. Desimone, No. 95-1058

Dear Ms. Tycz,

This is a follow-up to our conversation of this date wherein I explained to you that we represent Mr. Desimone in this action because: (1) we were appointed in the State court system to represent him at trial and on appeal due to his indigent status; (2) that the State of Nevada served a copy of its petition for writ of certiorari in this matter on our office because of our prior representation; and (3) the Court requested that we file a response to the State's petition after we had filed a waiver of response.

As I also explained, Mr. Desimone is no longer in the State of Nevada. We have had contact with him by telephone and will attempt to locate him so that we can have him fill out an appropriate affidavit. That affidavit will be sent to you upon its prompt return to us.

I hope this information is helpful to you. If you have any questions please do not hesitate to contact me.

Sincerely,

MICHAEL R. SPECCHIO
WASHOE COUNTY PUBLIC DEFENDER

by: _____
John Reese Petty
Chief Appellate Deputy

ORIGINAL

No. 95-1058

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE STATE OF NEVADA,

Petitioner,

v.

CORKY DESIMONE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF IN OPPOSITION

MICHAEL R. SPECCHIO*
Washoe County Public Defender

JOHN REESE PETTY
Chief Appellate Deputy
195 South Sierra Street
Reno, Nevada 89501
(702) 328-3464

Counsel for Respondent.
* Attorney of Record

QUESTIONS PRESENTED

1. Does the mere entry of an uncontested, uncollected and unpaid default judgment entered in a drug tax proceeding constitute "punishment" for double jeopardy analysis, this barring a subsequent criminal prosecution?

2. Does jeopardy attach upon the entry of a default judgment in a drug tax proceeding which is not predicated upon a finding of guilt?

3. If tax liability, under Nevada's drug tax statute, rests on elements which are different from those necessary for criminal liability, are they the same offense?

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No. 95-1058

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE STATE OF NEVADA,

Petitioner,

v.

CORKY DESIMONE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF IN OPPOSITION

Respondent, Corky Desimone, respectfully requests that this Court deny the petition for writ of certiorari which seeks to review the opinion of the Supreme Court of the State of Nevada below. That opinion is reported at 111 Nev. ____, 904 P.2d 1 (1995) and is reprinted in the petition for writ of certiorari at Appendix A.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The double jeopardy clause of the Fifth Amendment to the Constitution of the United States.

2. The due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Chapter 372A of the Nevada Revised Statutes.

STATEMENT OF THE CASE

The facts of this case are not in dispute and are fully set forth in the opinion of the Supreme Court of the State of Nevada at 111 Nev. ____, ____, 904 P.2d at 2-3. Accordingly, Respondent, Corky Desimone, accepts the "Statement of the Case" as set forth in the petition for writ of certiorari at 3-5.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS ALREADY SETTLED THE QUESTION WHETHER A TAX MAY CONSTITUTE "PUNISHMENT" FOR PURPOSES OF DOUBLE JEOPARDY ANALYSIS, AND THE OPINION OF THE NEVADA STATE SUPREME COURT BELOW IS FAITHFUL TO THIS COURT'S HOLDINGS.

In Department of Revenue of Montana v. Kurth Ranch, ____ U.S. ____, 114 S.Ct. 1937 (1994), this Court addressed a similar taxing scheme as that in Nevada and noted that while it

"had never held that a tax violated the Double Jeopardy Clause, [it has] assumed that one might." 114 S.Ct. at 1945-1946 (footnote omitted). This Court noted that although taxes are motivated by revenue-raising purposes rather than punitive purposes nonetheless "at some point, an exaction labeled as a tax approaches punishment, and our task is to determine whether Montana's drug tax crosses that line." 114 S.Ct. at 1946. In finding that the tax did cross the line this Court said:

> [w]e begin by noting that neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax a form of punishment. In this case, although those factors are not dispositive, they are at least consistent with a punitive character. A significant part of the assessment was more than eight times the drug's market value -- a remarkably high tax. ... .
>
> Other unusual features, however, set the Montana statute apart from most taxes. First, this so-called tax is conditioned on the commission of a crime. That condition is "significant of penal and prohibitory intent rather than the gathering of revenue." .... In this case, the tax assessment not only hinges on the commission of a crime, it is also exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place. Persons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax.
>
> Taxes imposed upon illegal activities are fundamentally different from taxes with a pure revenue-raising purpose that are imposed <u>despite</u> their adverse effect on the taxed activity. But they differ as well from mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money. By imposing cigarette taxes, for example, a government wants to discourage smoking. But because the product's

> benefits -- such as creating employment, satisfying customer demand, and providing tax revenues -- are regarded as outweighing the harm, that government will allow the manufacture, sale, and use of cigarettes as long as the manufactures, sellers, and smokers pay high taxes that reduce consumption and increase government revenue. These justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tx could be equally well served by increasing the fine imposed upon conviction.

114 S.Ct. at 1946-1947 (footnotes omitted, emphasis in the original).

This Court concluded that the tax is "fairly characterized as punishment" and affirmed the judgment of the Court of Appeals. 114 S.Ct. at 1948. This Court said that "[t]he proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offence.'" 114 S.Ct. 1948.

In the instant case the same is true. Thus, in line with this Court's teachings, the Nevada Supreme Court analyzed the Nevada drug tax and found that NRS Chapter 372A "exhibits the same punitive aspects as the Montana illegal drug tax." 904 P.2d at 4. Continuing, the court said:

> First, the Nevada law imposes a $1,000 per-gram fee for methamphetamine (and a $100 per-gram fee for marijuana). This amount far exceeds the high rate of taxation condemned in Kurth Ranch.
>
> Second, potential tax proceeds are ear-marked to pay for anti-crime measures, as were the proceeds of the tax analyzed in Kurth Ranch.

> Third, the tax is designed to punish criminal activity. As Desimone point out, pharmaceutical companies, pharmacists, and medical practitioners are exempt from the tax. Thus, although criminal activity is not strictly required before the tax is imposed, the non-criminal possession and sale of controlled substances by legitimate manufacturers, distributors, and ultimate users fall outside the scope of the tax. ... . The retroactive use of the tax to punish, rather than to seek registration of controlled substances, is the manifest intent of NRS chapter 372A.
>
> Fourth, the methamphetamine confiscated by the State, like the marijuana confiscated in Kurth Ranch, was not in the possession or ownership of the defendant when the tax was imposed.
>
> We conclude, therefore, that the payment of a tax pursuant to NRS chapter 372A constitutes punishment, triggering the protections of the Double Jeopardy Clause. The Kurth Ranch factors reveal that NRS chapter 372A is far-removed in crucial respects from a standard tax statute.

904 P.2d at 4-5 (citations and footnote omitted).

The Supreme Court of the State of Nevada's opinion in this case was correct and is faithful to this Court's double jeopardy jurisprudence. Thus, the petition for writ of certiorari should be denied.

II.

THE FACT THAT THE TAX JUDGMENT ENTERED AGAINST MR. DESIMONE WAS BY WAY OF A DEFAULT JUDGMENT DOES NOT PRECLUDE A FINDING OF "PUNISHMENT" FOR PURPOSES OF DOUBLE JEOPARDY ANALYSIS.

The gravamen of the instant petition for writ of certiorari is that because the tax judgment entered against Mr. Desimone was by way of a default judgment, he suffered no

"punishment" and thus cannot invoke the protections of the Double Jeopardy clause concerning his subsequent criminal case. Indeed, drawing from forfeiture cases, Petitioner asserts that "if a person whose property is subject to forfeiture does not appear and make a claim, this omission results in the 'owner' not being placed in former jeopardy." Petition for Writ of Certiorari at 10. There are at least two things wrong with this analogy.

First, assuming that this is a correct statement of the law,[1] it has no bearing on the imposition of a tax judgment. The purpose of forfeiture is to punish by taking away property to which one has an ownership interest. In contrast the tax in this case was retroactively applied to "punish, rather to seek registration of controlled substances ... ." Desimone v. State, 111 Nev. at ____, 904 P.2d at 5. That is, the focus must be on the character of the sanctions as punishment, rather than the type of proceeding by which the sanctions were imposed. See Kurth Ranch, ____ U.S. ____, 114 S.Ct. at 1945-1948 (Court did not analyze the nature of the administrative proceeding to collect tax, but rather the character of the tax itself and concluded that it constituted punishment under the Double Jeopardy Clause).

Second, there is every indication in the developing

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[1]This proposition appears to be derived from Serfass v. United States, 420 U.S. 377 (1975) and United States v. Torres, 28 F.3d 1463 (7th Cir.1994), cert. denied, 115 S.Ct. 669 (1994), both of which are relied upon by the Petitioner herein.

caselaw that the forfeiture proposition stated above is starting to unravel. See, e.g., United States v. Brophil, 899 F.Supp. 1257 (D.Vt.1995); and Gainer v. United States, 904 F.Supp. 1234 (D.Kan.1995).

In Gainer, the district court, following Brophil, made the following observations:

> [o]f those courts which have addressed the issue that contesting the forfeiture is a condition precedent to raising a double jeopardy claim, the majority has held that jeopardy does not attach where the defendant does not become a party to the civil forfeiture proceedings. See United States v. Cretacci, 62 F.3d 307 (9th Cir.1995)(criminal prosecution following an uncontested administrative forfeiture does not violate the Double Jeopardy Clause); United States v. Torres, 28 F.3d 1463 (7th Cir.), cert. denied, ____ U.S. ____, 115 S.Ct. 669, 130 L.Ed.2d 603 (1994)(defendant cannot be placed in jeopardy if he has not appeared as a party in a proceeding; there having been no prior jeopardy, double jeopardy cannot apply). But see United States v. Brophil, 899 F.Supp. 1257 (D.Vt. 1995). (Civil forfeiture proceedings can place an individual in jeopardy even if the individual does not contest the proceeding).
>
> The Torres case appears to be the most widely cited and followed case in this emerging area of law of the civil forfeiture and criminal prosecution. ... .
>
> The district court in Brophil, however, held that failure to appear at a civil forfeiture proceeding does not preclude an individual from raising a double jeopardy claim in a subsequent criminal prosecution. Specifically, the court found that the Torres court had relied on Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975) to support its conclusion that a defendant is not placed in jeopardy if he fails to appear as a party to a civil forfeiture proceeding. Serfass, was not a multiple

> punishment case as was Torres, but rather a successive prosecution case. Brophil, 899 F.Supp. at 1260-62. Discussing the differences between multiple punishment and successive prosecution cases, the Brophil court concluded that Serfass and, by extension Torres, could not be applied to multiple punishment cases. However, the holding of Halper and Kurth Ranch, multiple prosecution cases, are applicable.
>
> Using this reasoning, the Brophil court found Kurth Ranch correctly states the multiple punishment position by examining the character of the act that is the punishment rather than examining the nature of the proceeding or the defendant's appearance at the proceeding. Id. at 1264. "It is clear under Kurth Ranch that a civil proceeding to collect a monetary penalty for a crime and a separate criminal prosecution for the same crime constitute separate proceedings for purposes of the Double Jeopardy Clause." Id. at 1265.

904 F.Supp. at 1236-1237. Accord, United States v. Ursery, 59 F.3d 568, 575 (6th Cir.1995)(the forfeiture and conviction are punishment for the same offense because the forfeiture necessarily requires proof of the criminal offense). Thus, "the character of the act of forfeiture is without question punishment whether or not a defendant appears as part of the proceeding." Gainer v. United States, 904 F.Supp. at 1237.

CONCLUSION

The Double Jeopardy Clause of the United States Constitution provides in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb ..." U.S.Const.Amend. V. This clause protects against three distinct abuses: (1) a second prosecution for the same offense

after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. United States v. Harper, 490 U.S. 435, 440 (1989); North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

In the instant case the Supreme Court of the State of Nevada correctly held that the drug-tax judgment that had been taken against Respondent under the provisions of NRS chapter 372A constituted punishment. Thus, that punishment which arose out of the same criminal offense but which was imposed first, precluded the State from further criminal prosecution of Mr. Desimone.

Accordingly, the petition for certiorari should be denied.

Respectfully Submitted

MICHAEL R. SPECCHIO*
WASHOE COUNTY PUBLIC DEFENDER

Michael R. Specchio

John Reese Petty
Chief Appellate Deputy
195 South Sierra Street
Reno, Nevada 89501
(702) 328-3464

Counsel for Respondent

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April 8, 1996

William K. Suter
Clerk of the Court
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-0001

Re: Nevada v. Desimone, No. 95-1058

Dear Mr. Suter,

Please find enclosed one (1) original and ten (10) copies of a Brief in Opposition to the petition for writ of certiorari; one (1) and ten (10) copies of a motion for leave to proceed in forma pauperis on behalf of respondent, Corky Desimone; and one (1) and ten (10) copies of a certificate of service. By this letter I also certify that a copy of this letter and a copy of each of the documents listed above have been personally delivered to Gary H. Hatlestad, Deputy District Attorney, attorney of record for petitioner.

Sincerely,

MICHAEL R. SPECCHIO
WASHOE COUNTY PUBLIC DEFENDER

by: _____
John Reese Petty
Chief Appellate Deputy

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